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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

VIRGINIA KALOCZI, Plaintiff and Appellant, v. BANK OF AMERICA, N.A. et al., Defendants and Respondents.	A153223 (Solano County Super. Ct. No. FCS048491)

More than five years after Virginia Kaloczi's real property was sold in a nonjudicial foreclosure, Kaloczi filed a suit for wrongful foreclosure. The trial court sustained a demurrer without leave to amend on several grounds, one of which was that the wrongful foreclosure claim is time barred; Kaloczi now appeals from the subsequent judgment of dismissal. Kaloczi concedes that her suit was filed after the statute of limitations had run, but argues that her First Amended Complaint pleads facts establishing that the statute was tolled by the discovery rule, and argues in the alternative that the trial court should have granted leave to amend to plead additional facts showing that the discovery rule applies. Finding no error, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

A. *Facts*

We draw our summary of the facts from Kaloczi's First Amended Complaint and the associated exhibits, which were attached to her original Complaint.

In December 2006, Kaloczi executed a promissory note (Note), secured by a deed of trust that was recorded against her residential real property in Vallejo. The deed of

trust identifies defendant Mortgage Electronic Registration Systems, Inc. (MERS) as beneficiary, "acting solely as a nominee" for the lender and its successors and assigns.[1] At all relevant times, Kaloczi's loan was serviced by defendant Bank of America, N.A. (BANA) or its predecessor in interest.

The original lender sold Kaloczi's loan almost immediately. Eventually the loan became part of a mortgage-backed securities trust established by Mortgage Asset Securitization Transactions, Inc. (MASTR Trust). Defendant U.S. Bank National Association (US Bank) is trustee of the MASTR Trust.

On November 23, 2009, a notice of default was recorded on behalf of US Bank. The notice of default was executed by an agent for MERS, which was identified as the beneficiary of the deed of trust. Also on November 23, 2009, MERS executed a Substitution of Trustee and Assignment of Deed of Trust (2009 Assignment), substituting Recontrust Company, N.A. (Recontrust) as trustee under the deed of trust and assigning the beneficial interest under the deed of trust to US Bank. The 2009 Assignment was recorded on December 22, 2009. Kaloczi alleges that because her loan had been sold by the original lender, MERS lacked authority to execute the 2009 Assignment, and the 2009 Assignment was "null and void *ab initio*," and neither Reconstruct nor US Bank had the authority to take any action relating to the deed of trust.

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[1] In *Herrera v. Federal National Mortgage Assn.* (2012) 205 Cal.App.4th 1495, the Court of Appeal wrote, "[T]he ' "MERS System" ' is 'a method devised by the mortgage banking industry to facilitate the securitization of real property debt instruments. As described in *Mortgage Electronic Registration Systems v. Nebraska Dept. of Banking & Finance* (2005) 270 Neb. 529, MERS is a private corporation that administers a national registry of real estate debt interest transactions. Members of the MERS System assign limited interests in the real property to MERS, which is listed as a grantee in the official records of local governments, but the members retain the promissory notes and mortgage servicing rights. The notes may thereafter be transferred among members without requiring recordation in the public records.' " (*Id.* at p. 1503, quoting *Fontenot v. Wells Fargo Bank, N.A.* (2011) 198 Cal.App.4th 256, 267.)

She alleges that Recontrust recorded two notices of trustee's sale, one on June 23, 2010, with a sale date for the property of July 14, 2010, and one on May 18, 2011, with a sale date of June 9, 2011.

On September 21, 2011, US Bank executed a document assigning the deed of trust to defendant BANA. Kaloczi alleges that because US Bank never received effective assignment of any interest in the deed of trust, this assignment, like the 2009 Assignment, is "fatally defective, null and void *ab initio*." Also on September 21, 2011, Recontrust, as trustee under the deed of trust, executed a trustee's deed upon sale, stating that the property had been sold at public auction to BANA for the benefit of the MASTR Trust. Kaloczi alleges that because Reconstruct was not a properly substituted trustee and US Bank (trustee for the MASTR Trust) was an invalid beneficiary, the foreclosure sale is "fatally defective and void and must be unwound." The September 21, 2011 assignment and the trustee's deed upon sale were both recorded on September 28, 2011.[2]

B. *Proceedings Below*

In March 2017, Kaloczi filed a verified Complaint against MERS, BANA and US Bank alleging, among other claims, a claim for wrongful foreclosure.[3] Her claim rests on her contention that when MERS executed the 2009 Assignment, MERS was not the nominee for the holder of her Note, and therefore the 2009 Assignment was void. In her Complaint, Kaloczi alleged that she "was unaware that the foreclosure sale of her home was illegal until she retained the services of a forensic mortgage loan auditor and attorney

[2] The property was later sold to a third party, as reflected in a grant deed that was recorded in May 2012.

[3] To plead a cause of action in tort for wrongful disclosure, a plaintiff must allege the following elements: " '(1) the trustee or mortgagee caused an illegal, fraudulent, or willfully oppressive sale of real property pursuant to a power of sale in a mortgage or deed of trust (2) the party attacking the sale (usually but not always the trustor or mortgagor) was prejudiced or harmed; and (3) in cases where the trustor or mortgagor challenges the sale, the trustor or mortgagor tendered the amount of the secured indebtedness or was excused from tendering.' " (*Miles v. Deutsche Bank National Trust Co.* (2015) 236 Cal.App.4th 394, 408, quoting *Lona v. Citibank, N.A.* (2011) 202 Cal.App.4th 89, 104.)

to investigate the chain of title to her loan and advise her of her legal rights," and on that basis requested "equitable tolling of any applicable statute of limitations."

MERS and BANA filed a demurrer,[4] arguing among other things that Kaloczi's claim was time barred. Before the scheduled hearing date, Kaloczi filed a First Amended Complaint that expanded on the allegations pertaining to the statute of limitations. This is the entirety of her new allegations: she "was put on inquiry notice that Defendants' illegal practices caused her harm only upon reviewing the audit report issued by the auditor on January 2, 2017. Therefore, under the discovery rule, her wrongful [foreclosure] cause of action accrued on January 2, 2017. Plaintiff did not sit on her legal rights. Instead, she directed her attorney to file suit as soon as possible. The Complaint initiating the instant action was filed on March 6, 2017, a mere two months after Plaintiff became aware of the possible harm she suffered at the hands of the Defendants."

Defendants again demurred.

The trial court rejected Kaloczi's arguments that her wrongful foreclosure claim was saved by the delayed discovery rule and that she could amend her complaint to avoid the bar of the statute of limitations.[5] The court sustained Defendants' demurrer without leave to amend, the case was dismissed,[6] and Kaloczi timely appealed solely as to her cause of action for wrongful foreclosure.

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[4] US Bank did not appear in the trial court and is not a party to this appeal. We use the term "Defendants" to refer to MERS and BANA.

[5] The court also rejected Kaloczi's arguments that she had adequately alleged that the 2009 Assignment was void, and that she was not required to tender the amount in default. Kaloczi addresses these issues in her appeal, but we do not reach them, in view of our conclusion that the trial court did not err in its rulings on the statute of limitations.

[6] Kaloczi also alleged violation of Business and Professions Code, section 17200 et seq. and unjust enrichment. Like the cause of action for wrongful foreclosure, these causes of action were successfully challenged by demurrer. Kaloczi does not challenge the dismissal of these causes of action, and we do not discuss them further.

DISCUSSION

A. *Standard of Review*

"When reviewing a judgment dismissing a complaint after the granting of a demurrer without leave to amend, courts must assume the truth of the complaint's properly pleaded or implied factual allegations. [Citation.] Courts must also consider judicially noticed matters. [Citation.] In addition, we give the complaint a reasonable interpretation, and read it in context. [Citation.]" (*Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081 (*Schifando*).) "We do not, however, assume the truth of contentions, deductions, or conclusions of fact or law." (*Moore v. Regents of University of California* (1990) 51 Cal.3d 120, 125.)

"[W]e determine whether the complaint states facts sufficient to state a cause of action." (*Schifando, supra*, 31 Cal.4th at p. 1081.) "If the complaint states a cause of action under any theory, regardless of the title under which the factual basis for relief is stated, that aspect of the complaint is good against a demurrer." (*Quelimane Co. v. Stewart Title Guaranty Co.* (1998) 19 Cal.4th 26, 38.)

If we conclude that the complaint does not state a cause of action, "we must decide whether there is a reasonable possibility the plaintiff could cure the defect with an amendment. [Citation.]" (*Schifando, supra*, 31 Cal.4th at p. 1081.) It is the plaintiff's burden to "demonstrate the manner in which the complaint might be amended." (*Hendy v. Losse* (1991) 54 Cal.3d 723, 742.) The demonstration "need not be made in the trial court so long as it is made to the reviewing court. [Citations.]" (*Careau & Co. v. Security Pacific Business Credit, Inc.* (1990) 222 Cal.App.3d 1371, 1386.)

B. *Analysis*

A cause of action for wrongful foreclosure based on a void assignment of a deed of trust, which requires an illegal sale and harm to the trustor, generally starts to run on the day of the foreclosure sale. (5 Miller & Starr, Cal. Real Estate (4th ed. 2018) § 13:255, p. 13-1091.) The statute of limitations for a wrongful foreclosure claim is three years, which means that the limitations period here began to run by September 28, 2011,

when the trustee's deed upon sale was recorded, and expired by September 28, 2014, more than two years before Kaloczi filed suit.

Kaloczi concedes that her wrongful foreclosure claim was filed after the statute of limitations had run. She argues that the trial court erred in determining that the statute was not tolled by the discovery rule and contends that even if the allegations in her First Amended Complaint were inadequate, the court should have given her leave to amend to allege additional facts. We disagree.

"A plaintiff must bring a claim within the limitations period after accrual of the cause of action." (*Fox v. Ethicon Endo-Surgery, Inc.* (2005) 35 Cal.4th 797, 806 (*Fox*), citing Code Civ. Proc., § 312.) "Generally speaking, a cause of action accrues at 'the time when the cause of action is complete with all of its elements.' [Citations.] An important exception to the general rule of accrual is the 'discovery rule,' which postpones accrual of a cause of action until the plaintiff discovers, or has reason to discover, the cause of action. [Citations.] [¶] A plaintiff has reason to discover a cause of action when he or she 'has reason at least to suspect a factual basis for its elements.' [Citations.] Under the discovery rule, suspicion of one or more of the elements of a cause of action, coupled with knowledge of any remaining elements, will generally trigger the statute of limitations period." (*Fox*, *supra*, 35 Cal.4th at pp. 806-807.) "The discovery rule only delays accrual until the plaintiff has, or should have, inquiry notice of the cause of action." (*Id.* at p. 807.)

"In order to rely on the discovery rule for delayed accrual of a cause of action, '[a] plaintiff whose complaint shows on its face that his claim would be barred without the benefit of the discovery rule must specifically plead facts to show (1) the time and manner of discovery *and* (2) the inability to have made earlier discovery despite reasonable diligence.' [Citation.] In assessing the sufficiency of the allegations of delayed discovery, the court places the burden on the plaintiff to 'show diligence'; 'conclusory allegations will not withstand demurrer.' [Citation.]" (*Fox, supra*, 35 Cal.4th at p. 808.) "Simply put, in order to employ the discovery rule to delay accrual of a cause of action, *a potential plaintiff who suspects that an injury has been wrongfully*

caused must conduct a reasonable investigation of all potential causes of that injury. If such an investigation would have disclosed a factual basis for a cause of action, the statute of limitations begins to run on that cause of action when the investigation would have brought such information to light. In order *to adequately allege facts supporting a theory of delayed discovery, the plaintiff must plead that, despite diligent investigation of the circumstances of the injury, he or she could not have reasonably discovered facts supporting the cause of action within the applicable statute of limitations period*." (*Fox, supra,* 35 Cal.4th at pp. 808-809, italics added.) Accordingly, it is Kaloczi's burden to "clearly and unambiguously set forth all the facts necessary to show [she] can cure the statute of limitations defect." (*Friends of Shingle Springs Interchange, Inc. v. County of El Dorado* (2011) 200 Cal.App.4th 1470, 1485.)

In her First Amended Complaint, Kaloczi alleges the time and manner of discovery of her injury (January 2, 2017, upon reading the auditor's report), but she does not plead any facts to show her inability to know or suspect earlier that someone had done something wrong to cause her injury. In these circumstances, the trial court did not err in concluding that the discovery rule did not apply.

We turn now to the question whether the trial court erred in denying Kaloczi leave to amend her complaint. In opposition to the demurrer, Kaloczi argued additional facts to support her claim that the discovery rule applied and asked for leave to amend her complaint to allege them. She asserts exactly the same facts on appeal. Like the trial court, we conclude that she has not shown that she can allege facts to show that the discovery rule applies.

These are Kaloczi's additional facts: She received several foreclosure notices over a period of two years, but no foreclosure sale had ever taken place to her knowledge. She was never notified of the September 2011 foreclosure sale. At the time of the sale, she was not living at the property, but her tenant occupied a unit there. At some point after the sale (she provides no date), Kaloczi returned to the property, which was vacant except that her tenant was still there, so Kaloczi "believed the [p]roperty had not been sold in foreclosure." Kaloczi later received an eviction notice (she provides no date), in response

to which she met with a lawyer who attempted without success to help her with the eviction, and who she alleges did not tell her that the property had been sold. On several occasions (she provides no dates) she asked loan servicer BANA "what was going on with her home," and was told "your property is in foreclosure." At some point in 2016, Kaloczi's brother recommend that she contact a forensics mortgage loan auditor to find out what had happened to the property. Kaloczi then attended a seminar where the auditor spoke, and she retained the auditor's services. The auditor's report was issued on January 2, 2017. Kaloczi says that upon reading it, she "learned, for the first time, that her [p]roperty had been sold on September 21, 2011. She also learned that the loss of title to the [property] might have been caused by the illegal activities of BANA and others." Kaloczi then met with a lawyer, hired him, and filed her action in March 2017.

We conclude that even if the recording of the trustee's deed upon sale on September 28, 2011 combined with Kaloczi's receipt of "foreclosure notices" did not constitute constructive notice that the property had been sold and Kaloczi had been injured, Kaloczi was on inquiry notice as to her wrongful foreclosure claim when she received the eviction notice. Even an unsophisticated property owner is on notice that she has suffered harm when she receives a notice evicting her from what she believes to be her own property. (*Fox, surpra,* 35 Cal.4th at p. 808 [plaintiffs charged with presumptive knowledge of an injury if they have information or circumstances to put them on inquiry or the opportunity to obtain knowledge from sources open to their investigation].) Here, Kaloczi had not only an eviction notice, but also the "foreclosure notices" she had received over a period of two years, and therefore at the latest, the statute began to run when she received the eviction notice, which put Kaloczi on notice to investigate the status of the property. Significantly, Kaloczi is not forthcoming as to when she received the eviction notice, and we will not assume that she received it within three years before she filed suit.

It is clear from Kaloczi's proposed allegations that she had a suspicion that her injury had been wrongfully caused long before she received the auditor's report, because she consulted with an attorney in an attempt to stop the eviction, and she investigated the

status of her property after the eviction by asking BANA "what was going on with her home." Kaloczi does not tell us when she made those inquiries of BANA, or what, if anything, she did by way of follow-up. We are not persuaded that questions to BANA constituted "a reasonable investigation of all potential causes" of her injury. (*Fox*, *supra*, 35 Cal.4th at p. 808.) Kaloczi suggests that in view of BANA's response that the property (which had actually been sold) was "in foreclosure," she was somehow prevented from knowing that she had been harmed, and argues that she had no reasonable suspicion of wrongdoing until 2016, at the earliest, when she attended the auditor's seminar. But Kaloczi does not allege that she checked the status of the property at the county recorder's office, or consulted with an attorney about the status of the property, nor does she allege that anyone prevented or even dissuaded her from doing so within the limitations period. Had she done so, she could have readily discovered the facts on which she bases her complaint well before January 2017. Absent such allegations, Kaloczi has not shown that the discovery rule tolls the statute of limitations under the facts here.

Kaloczi concludes her briefing on appeal with a plea for leave to cure deficiencies in her complaint. But Kaloczi has not met her burden to show that she can cure the statute of limitations problem, despite having several opportunities to do so. Defendants' demurrer to her original Complaint alerted her to the statute of limitations issue. She failed to cure the defect in her First Amended Complaint; she failed to cure the defect in opposing the demurrer to the First Amended Complaint; and she has not made any further effort to cure the defect on appeal. Accordingly, we affirm the trial court judgment.

DISPOSITION

The judgment is affirmed. Respondents shall recover their costs on appeal.

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Miller, J.

We concur:

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Richman, Acting P.J.

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Stewart, J.

A153223, *Kaloczi v. Bank of America*